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TO HIS GRACE

WILLIAM

DUKE of HAMILTON

THEIR

MAJESTIES

HIGH

COMMISSIONER

And the Honorable

ESTATES of PARLIAMENT,

John Carter Brown Library

HUMBLY SHEWETH, THE

Answers for *Hendry Navilpayne*, To the Inditement raised at the Instance of Their Majesties Advocate, before the High Court of Parliament.

WHereas it is Lybelled in the said Inditement, That the Defender did come here to *Scotland* for purchewing Treasonable practises, against the Government; And that being thereupon apprehended & Imprisoned, he hath hitherto prosecute the said design by keeping Correspondence with dissatisfied Persons and Enemies to Their Majesties Government; & did openly declare, That there was an Invasion designed both Here & in *England*, and that the Defender did carry on the same under disguised names, both for Persons and Things; And that his said Project is already found, and declared by a vote of Parliament, past upon a letter alleaged written by the Defender; dated the 3d: of *December* 1692: And which letter is *verbatim* contained in the said Inditement, and a Commentar or Exposition put thereupon by my Lord Advocate; And pretending, That there are several other letters written; and subscribed by the Defender, by which his hand write, and guilt of the premisses will evidently appear.

It is Answered for the Defender, That, He is exceedingly surprised to see such an Inditement pretented against him, And, the rather, That being a Stranger, and absolutely ignorant of the Laws and Customs of this Kingdom, He should have received an Inditement upon Thursday last, to Compear and Answer this day, And so, not having six free dayes! And Lawyers having refused to give him Advice before they were Authorised by their Majesties Commissioner, and the Estates of Parliament, to do the same. It is impossible for the Defender, to have all these Evidences read in so short a time, which he would have adduced for Vindication of his own innocencie, anent all that is lybelled against him, in case he had been charged upon fifteen free dayes, as (conform as the Defender is informed) is usual to be practised in the like cases, Especially where the Defender was for so long time a closs prisoner, and so precluded from having the Advice or converse of any person, whereby he might have been assisted to prepare himself for this Tryal; And therefore, He humbly beggs, and expects, from the High and Honourable Court of Parliament, That they will be pleased to allow him some further time to have his Defences and instructions thereof, in readiness against this inditement.

But least it should be pretended, That the Defender were inclyned to shift and tergiverse in this Affair, Albeit he hath not all the proofs and Evidence of his innocence here in readiness, which otherwise he could have adduced, in case a competent time had been allowed him; Yet for convincing their Majesties High Commissioner, and the Honourable Estates of Parliament (as far as is possible upon such a surprize) of the Defenders innocence, He doth absolutely deny the Inditement, and whole Members Qualifications, Circumstances, and Aggravations therein contained; And as to that point of the lybel anent the Defender his coming to *Scotland*, out of a treasonable design, denying, as said is, It is represented for him; That as he hopes it is well known to several Honourable Members of Parliament, That the pannal upon his first entting within the Kingdom, was apprehended without any wartand from Authority, by a number of Countrey People, who were occasionally convocate together for the time, And brought to *Edinburgh*, where he was immediately imprisoned, and in which place, and in *Stirling* and *Blackness*, he hath continued now prisoner for the space of more then three years; And for more then two of these years a closs Prisoner; And the true design of the Pannals coming for *Scotland* was that he being a *Roman Catholick*, And apprehensive, that those of his perswasion might meet with some severities in *England*: And having

having sent some of his Effects abroad, he did resolve to have gone off the Kingdom, and lived privately; But there being an Embargo then put upon all the Ships in *England*, so that he could get no occasion for going abroad at any Harbour there; He came for *Scotland* out of a harmless design, to get the occasion of shipping here; And which is evident and undenyable, and clear from this, That there was not found in his Custody, when he was first apprehended, any Papers relating to the Government any manner of way, and the only Paper then found upon him, being a Catalogue of the initial letters of five mens names, with two Letters subjoyned to each of these two Initial Letters, he did before the Lords of Privy Councill, when he was under Tortour, Freely and Candidly expone these Initial Letters, and designations thereto subjoyned, by declaring that J: G: L: S: was understood. *John Gilles* Skiper in *Leith*, where the Pannal was intended to have come and stayed until he had got occasion of Shipping abroad, and that the other two to which the two letters M. A. were subjoyned, were Merchants at *Amsterdam*: And the last two to which the letters B: P: were subjoyned, were Bankers at *Paris*, with whom the Pannall had setled some of his Effects: And the pannal did then condescend upon the names and surnames of the said four persons, And that there were then such persons in *Amsterdam* and *Paris*, as the pannal did then condescend upon: Neither then was, nor as yet can be contraverted, so that the pannal admires that their Majesties Advocate should as a preface to this inditement, alleadge that the pannals coming to *Scotland*, was out of a Treasonable design, thereby to represent him as unfavourable to the Members of the High and Honourable Court of Parliament, He being a Stranger to this Kingdom, and absolutely innocent thereof, as is above represented: And that their Majesties Advocate should farder insinuate, that the pannal during his imprisonment should have been tampering with Enemies, for disturbing of the Government, and peace of the Kingdom: It being clear and obvious, That a prisoner, especially a closs prisoner, to whom paper, pen, and ink, and access from all other persons were discharged, could not be in any possible capacity, for managing or carrying on any such contrivances or designes: And albeit the pannal his long and tedious imprisonment, and what he suffered while he was prisoner, could not but be grievous to any Mortal: Yet he patiently enduted the same, with that just submission, and humble acquiescence that is due to Authority; And therefore he humbly conceives, that Charity it self will vindicate a poor Stranger from any such imputation; And that he needs not make use of any other legal Argument for his Vindication thereof, And in Case the Pannal were Conscious to himself of any such Guilt or Design, as truely he is not; Yet he hath this Unanswerable Defence in Law, That having endured Tortur two several times, and being Interrogat upon the Occasion, and his design of his coming for *Scotland* whilst he was under the Tortur, And having denyed any other Design, then as is above-represented, *viz:* to go abroad, and live privately, he cannot now be Indited or pursued upon that account, conform to the Law and Custome of all Nations.

And as to that part of the Inditement, bearing that the Pannal did frequently declare that there was an Invasion designed, *&c.* It is Answered, that denying the same, yet the Common Discourse of the Countrey, being these two years by past, that there was an Invasion designed from *France* into *Britain*: The Pannal his repeating the Common and ordinary Discourse of the Countrey; And which was contained in several publick News Letters, can never be stretched to make him lyable to the Crimes and Pains libelled. 2*do*. The Pannal not being a *Scots* Subject, and never having received any Benefite or Protection from the Government in *Scotland*: But being an *Englishman*, and there being more freedom and Liberty of Speech allowed in *England*, than is permitted by the Law of *Scotland*, albeit any Rash Expressions had escaped the Pannal (and which he absolutely denyes) yet he could only be Tryed and Punished therefore, conform to the Laws of his Native Countrey of *England*, by whose Laws & Customes He was obliedged to Walke and Conform his Life and Deportment into, and not conform to the Laws of *Scotland*, whereof he was no Subject; And which he neither knew, nor was presumed or obliedged to know. 3*tio*. The Pannal being Naturally Melancholy, and His Melancholy being much augmented and increasedby His long Imprisonment & Sufferings. It is offered to be proven, that during all the time of His Imprisonment, His Conversation & Discourse was Harmeless & Innocent, & Free & Open, as is Natural to all *Englishmen*: So that in Charity (if any Discourse hath escaped Him) The same ought to be Interpreted, as deligned only to suport himself against the Grouth and Increase of his Melancholy, especially seeing it cannot be made appear, that in his Discourses he did Tamper with any Person, But on the contrair, that he used that same freedom of Discourse with all concerned in the Government and Authority, with whom he had Occasion to Converse, which he did Utter and Express to any other person whatsomever. And it is not conceiveable how such Discourses can be stretched to inferr any Plot or Contriveance by the Pannal, when the same was publickly Talked and uttered by him, to those who were concerned in the Government.

And as to that part of the Libel, mentioning an Vote or Opinion of Parliament, The Pannal humbly conceives, that he himself cannot at all be Obliedged to make any answer thereto, there being no such Vote or Opinion of Parliament, or Double thereof, given to him with his Inditement. 2*do*. Neither (as the Pannal humbly conceives) can he any wayes be concerned therein, as to this Inditement presented against him: Because albeit the least suspision may give the Government occasion to secure the Kingdom against Plots and Mischeafs, yet where there is no Vote or Act of Parliament, fixing the guilt against the *Pannal Nominatum*, He can never be precluded from any Competent defence for securing of his Life, by any such Vote to the passing whereof the *Pannal* was not called.

And as to the last & matterial part of the Indytement, founded upon a missive Letter alleadged wirten by the *Pannal*: And the Commentar and exposition thereof contained in the inditement, and my Lord Advocat, his offering to prove the same to be the *Pannals* hand Write; *Comperatione literarum*, and by other papers and missive Letters under the *Pannals* own hand, ready to be produced.

It is Answered, that the *Pannal* doth absolutly deny that ever he Wrote any Letter of the Tenor, and Contents Libelled, and the said Principal Letter ought to have been produced and shewn to the *Pannal* himself. And he allowed to consider the same before he can be obliedged to make any Answer thereto. 2*do*. By the double of the said pretended Letter, as it is set down at the end of the Coppy of the Inditement given to the *Pannel*; The same appears neither to be subscrived by the *Pannal*, nor to be directed for any person whatsomever; So that it is obvious to common sence, that the said Pretended Letter hath been allennarly the product of the same distempered and Melancholly brain. 3*tio*. It is not at all Libelled, that ever this pretended Letter was sent abroad, or delivered to any Person whatsomever

ever, nor doth the inditement condescend upon any person, by whome the same was conveyed away, nor in whose Custody the said pretended Letter was found, without all which, were specially Libelled and instructed: The Inditement can never be found Relevant, to sustain this Criminal Libel and conclusion against the *Pannal*, because in case such a special Condescendance were made; The *Pannal* would exculpate himself by referring to, and proving by these persons Oaths, that the said pretended Letter had been conveyed and delivered to them by some other person than the *Pannal*; and that the same was the hand write of some other person than the *Pannel*, and that the Tenor, and import thereof was absolutely different from, and inconsistant with the exposition and Commentar, put thereupon, by my Lord Advocate. 4to. Albeit a person in a Melancholly or distemper, should Scribble over a rediculous and impertinent paper for the ease of his disturbed fancie for the time, yet in case he should either before he subscrived the same, and before he directed it to any person cancel the said impertinent and rediculous paper, or let the same fall by as neglected such a paper; albeit thereafter found in the Custody of the Melancholly Person or in his Room, would never make the said Melancholly person lyable to the Crimes and pains libelled, unless he had dispersed and sent the same abroad; because *hoc ipso*, that he never made use thereof, by directing the same to any person. Law presumes that he passed from, and repented of that which the distempered fitt of his melancholly had formerly prompted him to.

And as to that part of the inditement, bearing that my Lord Advocat Intends to prove *Comparatione Literarum*, that the said pretended missive Letter is the *Pannals* hand write. It is answered, 1mo. That seeing the Pannal absolutely denys the same to be his handwrite, or that he had accession thereto, or knows any thing of the designe thereof in the least, yet he humbly represents to my Lord Commissioners his Grace, and the Honourable Estates of Parliament, that it is an uncontraverted principle in Law, that as every man is presumed to be innocent and free from all guilt and fine, until the contrair thereof be instructed against him by a clear probation; So by the Laws and Customes of all Nations, and by the opinion of all Doctors that ever wrote upon the Criminal Law; This is uncontraverted and undenyable, that the guilt of any Crime, by which a Capital conclusion for taking away a mans life may be inferred, can be fixed upon any person, except by a positive probation, as clear as the Sun shininng in his Meridian: And neither the Law nor Custome of any Nation did ever allow Capital Crimes to be proven by conjectures or presumptions: And GOD Almighty himself by the mouth of *Moses*, requires two or three witnesses in all such casses: So that for my Lord Advocat to pretend to have a presumptive or conjectural probation sustained to him against the *Pannal*, who is a poor stranger, for taking away of his Life, is against the Law and practise of this, and all other Nations. 2do. Albeit *Comparatio Literarum* and of her papers have been sustained to Adminiculat a write, and to make up the defects of the solemnities thereof; yet no instance can be given, where ever such a probation was sustained Relevant, to fix a Capital guilt upon any person, to take away his Life. 3tio. As all probation, especially in casses capitally Criminal, ought to be clear as the Sun, and positive, and pregnat, and incapable of any doubtety, or uncertainty: So it is referred to my Lord Commissioner, his Grace, and the Honourable Estates of Parliament, whither a probation by comparison of Letters, and hand writes, can be so pregnant, clear, and certain, that it is absolutely incapable of being redargued by other documents, or whither or not the same be in all casses subject to doubtfulnes and uncertainty, seeing the most that can be inferred from such a probation is, That the hand Write are like to other, and (as alike, is not the same) So it is certain that many hand writes are like to others; And it is notterly known, and offered to be proven, That some persons have attained to that perfection of Writing, that they are able to counterfeit whole sheets of paper, as Writen by any other person, to that exactnes and perfection, that the person himself whose hand Write is fienzied and counterfeited, can scarcely be able to deny the same, to be his own hand Write; And seing a decision in Parliament, in this case will be a Rule & precedent, & have the force of a Law, in all criminal casses for the Future; It is Referred to the consideration of the High & Honourable Court of Parliament, what the dangerous consequence of such a preparative, might in process of time amount to, and whither the lives and fortunes of any Subject: Be not at the discretion of any silly Rogue who hath the skill and villany to counterfeit his hand Write. 4to. This is also an undenyable principle both in Law and Religion, that it is better to let a Thousand guilty persons go free, then that the blood of an Innocent person should be shed, Because, albeit a guilty person should escape the hand of Justice for a time, Almighty GOD might thereafter suffer him to fall in an other snare; By which he might thereafter be brought to condingue punishment for all: And which is not only clear from the instances of *Joab* and *Shimei*: But many instances thereof might be given in this and our Neighbour Nations: And the book entituled GODS Reveange against Murder, hath many examples thereof; Whereas on the other hand, the shedding of the blood of an innocent person, is like water spilt upon the ground, which cannot be gathered up, or recovered, but lyes as a burden upon the Land; *calling for Vengeance from Heaven*: And this is a common principle received, and constantly repeated in the mouths of all Mankind, That the case of a Defender, when pursued for his life, is alwayes most favourable; And when there is any thing doubtful, either as to the Relevancie or probation which may admit of a twofold sense or interpretation, The Exposition and Interpretation Thereof, is alwayes to be made in favours of the pannal, and Defenders: And by the Opinion of all Lawyers, *Jura sunt togenda*, That is, the Laws themselves are to be stretched, and even forced so far as is possible in favours of the pannal, for absolving him from the crimes lybelled, and preservation of his blood. 5to. Neither can my Lord Advocate be allowed to make use of any letters for probation against the pannall, seeing no such letters nor doubles thereof were given out to the pannal, with his inditement, as they ought to have been.

And as to the Commentar and Exposition of that pretended letter, whereupon the Inditement is founded, which my Lord Advocate hath made, *The Pannal not being at all concerned in the Letter, he cannot be concerned what Exposition or Commentar My Lord Advocat thinks fit, or fancies with himself to put upon the same*: And albeit doth admire the quickness of my Lord Advocates Fancie in that commentar; Yet he humbly conives, that his Fancie and Opinion can never be sustained to inter any crime or guilt against the pannal, Because, 1mo. The whole strain of that Exposition, being an alleadged Design in the Writer; As Law can be alleadged for allowing a Design, which is only the thought of a Mans breast, to be proby Witnesses, or by other Mens conjectures; So there is no instance thereof can be adduced in this ny other Nation, *The enquiring into and judging the thoughts of the heart, being the prerogative of GOD Alty, which He hath reserved to Himself, excluding all Mortals from any share thereof.* 2do. As the design and

meaning of the Writer of that pretended letter, is neither in Law probable by Witnesses, nor can the design thereof be inferred from presumptions or conjectures; So it is referred to the Wisdom of the Parliament, Whether or not the stretches made by my Lord Advocate in that expositon, be either presumable or consistent with themselves. Because, 1mo. The lybel tending to inferr the pannal his keeping a Treasonable correspondence with Enemies abroad: My Lord Advocate neither condescends upon the persons names, or designation, with whom the said correspondence is alleadged to have been kept, and without condescendance upon the same, the Relevancie cannot be sustained. 2do. Can any Rational Man presume or imagine, That the late King would take up his measures in matters of the greatest importance, from a person of so little signification and interest, and of so little conduct, as the pannal is known to be: Especially, considering the circumstances the pannal was in at the time, and for several years preceeding, being alwayes a prisoner, and for the most part of that time a clos prisoner. 3tio. How can the late King, his late Declaration for *England*, be pretended to be the product and consequence of this pretended missive letter, whereupon the Inditement is founded, as my Lord Advocate expresly lybells, Seeing it is clear, That the said pretended letter, did never come to the late Kings hands: For, if it had once come to his hands, how is it possible that it could now be produced before the Parliament, as a pretended instruction of his inditement. And this *per se* is sufficient to demonstrate to the World, That my Lord Advocates commentar and exposition of that pretended letter, is only groundless and conjectural: And doth redargue the Faith of his Commentars thereupon. 4to. Whereas it is pretended by my Lord Advocates commentar upon this letter, That the pannal desired a Gift from the late King of the Clerkship of *Edinburgh*, in favours of Mr. *Patrick Smith*, or his son, upon the account that his Wife had been long imprisoned upon the pannals account; And that the pannal would have been starved if he had not supplied him. It is answered, 1mo. That it is absolutely denyed, that ever Mr. *Patrick Smiths* Wife was imprisoned upon the pannals account, or that ever she was imprisoned since the pannal came to *Scotland*: Neither doth the pannal know if she be fled or not, or upon what account. And Mr. *Patrick Smith* is known to be in that circumstances, that he is even much straitned as to the maintainance of himself and his family. 2do. Could the pannal be pretended to be so ridiculous, (unless he had been under some melancholly distemper,) to write for the Gift of a Clerkship, where there was no Vaccancie, *Evan Macklood* being then in possession of the equal half of the place, long before Sir *James Rochead* deceast, And being secured in the survivancie of the other half many years before: And that Clerkship being known to be not at the Kings disposal, but only at the disposal of the Town Council, when vaccant. And to clear the High Court of Parliament, That this is only a designed stretch, for loading of the pannal, when the debates were betwixt the Old and New Councils of *Edinburgh*, anent their Elections: There was an other person then specially condescended upon, as designed for the Clerkship.

And as to that pretence, That in the said Letter by the word (Agents) is understood, My Lord Advocat, and Lord Justice Clerk, in respect they were nominate to these Imployments by the King, about four dayes before the date of that pretended Letter, *viz.* upon the 28 of *November*; And this pretended Letter, is alleadged to be dated the third of *December* thereafter. It is answered, that seeing it is impossible, that what was done at *London* upon the 28 of *November*, could have come to the Pannals Knowledge who was then a prisoner at *Blackness* in so few dayes, in that Season of the year: This doth convincingly redargue that part of my Lord Advocates Commentar; And the pannal is content to depone, *That he never knew or heard of my Lord Justice Clerk his being preferred untill he did see his Lordship, lately in the Tolbuith of Edinburgh. And, That he never heard of my Lord Advocates preferment, untill long after the date of that pretended letter.* And therefore it is referred to the Justice and Wisdom of the High Court of parliament, Whether or not such uncertain conjectures, as to all the Branches of my Lord Advocates Commentar and Expolition of that letter, evidently appears to be, Can by the Law of this or any other Kingdom be sustained, as is a clear and convincing probation to fix a Criminal Guilt upon a poor Stranger to take away his Life! And as the said Letter appears to be the nonsensical product of a disturbed Brain in all the points thereof; So there is neither any thing lybelled or produced, which can instruct any one of the Names or Particulars therein contained to be the same, which My Lord Advocat affirms and supposes in his Expositon.

And seeing by the Claime of Right of this Kingdom, (and which the Petitioner humbly conceives to be equivolent to the Petition of Right in *England*,) the great and unquestionable Securitys of the Subjects of his Native Kingdom,) It is expresly declared, that the pursuing persons, upon stretches from old and Obsolet Laws or upon Frivolous and Weak Pretences, or Lame and Defective Probation, are contrair to Law, and that there was never a Criminal Libel offered to be founded upon such Weak and Frivolous Pretences as this; The foundation thereof, being only a pretended Missive Letter, neither subscrived nor directed nor delivered to any person; But as it appears to be the Melancholy Product of a disturbed Brain. So also it appears to have been casually lost and neglected, and as there can neither Sense nor Crime be inferred from the Letter it self; So all that is libelled against the Pannal, as Criminal therefrom, is only founded upon My Lord Advocats own Fansie and Conjecture, So the Probation offered therefore, *Viz. Comparatio Literarum*, being such as never was yet sustained in any Court, for taking away the Life of a Man; The Pannal humbly conceives, that this Libel and Probation offered against him by the foresaid Clause in the Claime of Right, is expresly declared to be contrair to Law. And therefore, albeit the Pannal be a poor Stranger, and that he be also unknown to the Members of this Honourable Court of Parliament, as he is ignorant of the Laws of this Kingdom: Yet seeing it is his Misfortune (and for which he is heartily sorry) to be indited and accused of such high and Attrocious Crimes, He judges himself happy in this, that he is to be tryed before My Lord Commissioner, his Grace, and the Honourable Estates of Parliament, of whose impartial Justice to a poor Stranger now pursued for his Life, he is not in the least doubtfull, but on the Contrair out of the Conscioulnes of his own Innocence, doth repose an entire Confidence in their impartial Justice, And humbly expects therefrom to be assoilzied from his groundless lybel, which contrair to the claime of Right, is only founded upon frivolous and weak pretences, and craved to be supported and made out by a Lame and Defective Probation in manner Above represented.